No. 08-1359

Supreme Court, U.S.
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In The Supreme Court of the United States

DEBORAH L. FISHER,

Petitioner,

v.

HARRY VAN LOVEREN, M.D.; BRADLEY MULLEN, M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals First Appellate District Of Ohio

RESPONDENTS HARRY VAN LOVEREN, M.D. AND MAYFIELD NEUROLOGICAL INSTITUTE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a medical negligence action in which Petitioner Deborah L. Fisher alleged that Respondents, Harry Van Loveren, M.D. and Mayfield Neurological Institute, among others, committed malpractice in the care and treatment of Petitioner. Petitioner never asserted any constitutional issues against these Respondents.

The First District Court of Appeals for Ohio grouped the claims against these Respondents into three categories. First, Petitioner alleged that questions of fact existed based on her own expert's affidavits and deposition testimony such that summary judgment was inappropriate. Second, Petitioner alleged that these Respondents should have been vicariously liable for the acts of other individuals when no employment relationship existed and when these Respondents had no knowledge of the problems with Petitioner's health. Third, Petitioner alleges that the preparation of the operative note somehow creates liability when these Respondents were not responsible for preparing the note, and only did so when the individual responsible for its preparation refused to do so. The First District Court of Appeals for Ohio found in favor of these Respondents on all three points. More importantly, the allegations against these Respondents do not involve any federal issues or constitutional questions, but rather raise issues of purely state law.

QUESTIONS PRESENTED FOR REVIEW – Continued

The questions presented for review are as follows:

1. Did the Ohio Supreme Court err in finding no due process was violated in allowing a case to pend for eighteen years before finally granting defendant's third motion for summary judgment?

2. Did the Ohio Supreme Court err by holding that a patient's constitutional right to a trial by jury was unknowingly waived where an attending surgeon at a private hospital utilizes a resident physician who is involved in a State university program (from another hospital) who later claims immunity as a State employee?

3. Did the Ohio Supreme Court err in allowing the lower courts to apply case law from 2005 to the facts of this case which occurred in 1991 to deny petitioner's right to a jury trial of her factual issues?

4. Did the Ohio Supreme Court err in upholding the lower court's finding that *respondeat superior* requires actual knowledge by the master that the servant was negligent before the master can be liable?

5. Did the Ohio Supreme Court err in its ruling in *Comer v. Risko* holding that a plaintiff must sue both the master and servant before a master can be liable under *respondeat superior*, which is contrary to settled principles of agency law?

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Did the Ohio Supreme Court err in denying petitioner her Constitutional due process right to a jury trial when the record demonstrates clear unresolved issues of material fact?

7. Did the Ohio Supreme Court and lower courts err in granting summary judgment to defendants when a physician creates an operative report only after being sued and almost two years after the surgery?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Mayfield Neurological Institute, Inc. is not a subsidiary of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings as it relates to Mayfield Neurological Institute, Inc.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

A. Facts Relevant to the Petition

On December 18, 1990, Appellant was admitted to Good Samaritan Hospital for surgery to drain and remove a cyst in her brain. Appellant underwent neurosurgery on December 20, 1990, which was performed by Van Loveren with the assistance of Drs. Osborne and Mullen, both of whom were residents at the time; the surgery was performed at Good Samaritan Hospital.

The surgery was unremarkable and initially Appellant's recovery was going well. However, Appellant's condition deteriorated on December 24, 1990. Prior to that day, Dr. Van Loveren had visited Appellant on each post-operative day and he had been happy with the progress of her recovery. On December 24, 1990, Appellant was under the watch of resident Dr. Brad Osborne who was a first year surgical resident. Above Dr. Osborne was Dr. Brad Mullen who was in his final year of neurosurgical residency. The record suggests that Dr. Osborne consulted with Dr. Mullen on several occasions during the course of December

24, 1990 concerning the care of Appellant, but that Dr. Van Loveren was never contacted until late in the evening.

When Dr. Van Loveren was finally contacted around 11:00 p.m. the night of December 24, 1990, he immediately rushed to the hospital. He arrived at the hospital at approximately 11:15 p.m. and immediately began to assess the situation, taking immediate measures to improve Appellant's condition.

Based on the above facts, Appellant filed suit in the trial court on December 17, 1991. Through the course of discovery, Appellant identified an expert by the name of Dr. David Rutberg. During Dr. Rutberg's deposition, his opinions, including those provided in the two affidavits he submitted, were discussed in detail. Dr. Rutberg was specifically asked about any criticism he had of Dr. Van Loveren, to which he responded in the negative.

The only allegations against Respondents Dr. Van Loveren and Mayfield Neurological Institute relate to state law claims. At no time did Petitioner allege any federal questions or Constitutional issues.

B. Procedural History and the Opinions Below

This is a medical negligence action in which Petitioner Deborah L. Fisher alleged that Respondents, Harry Van Loveren, M.D. and Mayfield Neurological Institute, among others, committed malpractice in the care and treatment of Petitioner. Petitioner filed

her original Complaint in Hamilton County, Ohio on December 17, 1991.

Van Loveren originally filed a motion for summary judgment on February 13, 1996. The motion for summary judgment was held in abeyance to allow Fisher time to complete discovery. During the course of litigation, Fisher identified her medical expert as Dr. David Rutberg. Dr. Rutberg's deposition was taken on December 19, 1996, and was filed with the trial court on January 24, 1997. Van Loveren's motion for summary judgment, as well as the summary judgment motions of the co-defendants, was submitted without argument on February 14, 1997.

The trial court granted summary judgment in favor of Van Loveren by Memorandum of Decision dated April 24, 1997. Fisher sought reconsideration. Van Loveren opposed Fisher's motion for reconsideration and the trial court affirmed its grant of summary judgment by Memorandum of Decision on February 13, 1998 as to Van Loveren. An Order denying Fisher's motion for reconsideration and/or relief from judgment was placed of record on April 28, 1998. Finally, an Entry finalizing summary judgment in favor of Van Loveren was placed of record also on April 28, 1998.

Fisher timely filed her appeal in the First District Court of Appeals of Ohio following the grant of summary judgment in favor of Good Samaritan Hospital on March 1, 2007. The First District affirmed summary judgment on August 15, 2008. Fisher

timely petitioned the Ohio Supreme Court to take jurisdiction over the case, but the Ohio Supreme Court denied jurisdiction on January 28, 2009.

ARGUMENT OPPOSING CERTIORARI

Before addressing the merits of the Petitioner's proposed basis for review under 28 U.S.C. § 1257(a), these Respondents would first point out that the Petitioner did not raise any constitutional arguments or federal issues as it relates to these Respondents during any of the proceedings before the trial court or the reviewing First District Court of Appeals. A review of the Appellant's Brief filed with the First District Court of Appeals demonstrates that Petitioner has never raised any constitutional questions or federal issues that would warrant this Court's consideration or time. In fact, the only issues on appeal related to these Respondents is found in Assignment of Error No. 1, which argues that issues of material fact existed as to expert criticism and questions over a delay in creation of a medical note; both items involve questions of purely state law.

It is well established that the United States Supreme Court will not decide whether constitutional rights have been violated where federal questions are not seasonably raised in accordance with the requirements of state law. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Edelman v. People of State of Cal.*,

344 U.S. 357 (1953); and *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Based upon this Court's well-established precedent precluding the review of constitutional issues which were not properly raised during the course of the state review, the Petitioner's attempt to raise due process arguments before this Court for the first time as it relates to these Respondents is improper. For this reason alone, the Petition for Writ of Certiorari should be denied.

Likewise, how state law applies to a particular set of facts is a matter best left to the state supreme court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The allegations raised by Petitioner against these Respondents are matters of state law. Specifically, Petitioner attempts to hold a doctor responsible for the actions of other providers under a theory of *respondeat superior* when there is no employment relationship involved; the factual assessment of whether *respondeat superior* is applicable requires the application of Ohio law. Because Petitioner does not indicate how the interpretation of the applicable Ohio law by the lower courts conflicts with the U.S. Constitution, or how it raises a federal question, Certiorari should be denied.

Separate and apart from the Petitioner's failure to raise constitutional or federal issues set forth in its Petition for Certiorari as it relates to these Respondents before any Ohio court, Respondents would further argue that the Petitioner's alleged basis for review is neither substantiated in the facts of this

case nor in the well-established law of this Court. A review of the questions presented by Petitioner results in the conclusion that only questions 4 through 7 are relevant to these Respondents.[1] Hence, only those questions will be addressed.

Respondeat Superior Does Not Apply

Petitioner's proposition that the lower courts added an element of "actual notice" to the theory of *respondeat superior* fails because it misstates the actual ruling of the lower court. As this Court has previously stated, "[i]t is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998). However, neither this Court nor any other court or legislative body has ever held a party responsible for the acts of another when no employment relationship or agency relationship exists. The trial court and First District Court of Appeals for Ohio applied well settled law in Ohio that is specifically applicable to this case. This is not a general vicarious liability situation, which usually contains some type of actual agency relationship such

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[1] Petitioner's Brief does not address the questions presented in the order in which they are listed. However, to avoid confusion, Respondents will address the questions presented in the order in which they are listed.

as in an employer-employee relationship. Rather, this case involves a treating physician and covering physicians who are responsible for the care of the patient while the treating physician is not available. There is no agency relationship here, as in normal vicarious liability situations. In this case, Van Loveren is not an employee of the hospital, nor is he the employer of the residents. Therefore, under Ohio law, liability in this situation is generally based on a physician's direct, personal or proximate supervision over the hospital employee. *See Ferguson v. Dyer*, 149 Ohio App.3d 380, 385-86, 2002-Ohio-1442 (2002).

This Court considered the proposition of such an extension of traditional *respondeat superior* liability in the case of *General Building Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 102 S. Ct. 3141 (1982). Liability was imposed by the district court on contractors and their trade associations for the discriminatory acts of a union; this Court reversed finding that "[e]ven if the doctrine of *respondeat superior* were broadly applicable . . . it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship." *Id.* at 392. The reasoning of this Court in the *General Building Contractors Assoc.* case is applicable to the facts of this case:

> At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Equally central to the master-servant relation is the master's

> control over or right to control the physical activities of the servant. The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.

Id. at 393-94 (citations omitted). Petitioner would have this Court impose an agency relationship on multiple doctors treating a patient when there is no employment or other type of relationship among those doctors. While Dr. Van Loveren would have the power to oppose treatment by other doctors that he believed was inappropriate, he did not have the power to control the acts of the other treating doctors when he was not around. As is true in virtually every hospital setting, a doctor must rely on other providers to let him or her know of any problems during recovery, and can only be liable for the acts of other providers if he or she knows the inappropriate treatment is being provided and, based on this knowledge, still decides not to act. That is the law in Ohio, and the law that was applied by the lower courts in reaching their decisions.

The suggestion by Petitioner that a truck company would not be responsible for the acts of its drivers when there is no "actual knowledge" is misplaced. No court has ever suggested that the doctrine of *respondeat superior* requires actual knowledge. Rather, the lower courts in this case have recited and followed well-established Ohio law relating to the responsibility of an attending physician only when that attending physician has actual knowledge of improper care and treatment being performed by others involved when there is no employment relationship between that attending physician and the other caregiver(s). *See Baird v. Sickler*, 69 Ohio St.2d 652, 433 N.E.2d 593 (Ohio 1982). There simply is no support under Ohio law or outside the state which would impose liability on a physician for the acts or failure to act by residents if the doctor is not informed of the complications.

No Issues of Material Fact Exist as to these Respondents

At all stages of the proceedings below Petitioner raised the argument that questions of fact precluded the granting of summary judgment. However, the courts below properly applied Ohio law to determine that no questions of fact existed as to these Respondents. It is important to note that the arguments raised by Petitioner relating to the questions of fact dealt with the medical treatment and whether that treatment fell below the accepted standards of care in Ohio.

During the trial court proceedings, Petitioner identified her medical expert. That expert provided an affidavit and was also deposed by defense counsel. In both the affidavit and in his deposition testimony, Petitioner's medical expert unequivocally testified that he had no criticism of Dr. Van Loveren. Hence, there was no issue of fact.

Petitioner also argues that the issue surrounding the creation of a late operative report created a question of fact that violated her due process rights. The issue of the operative report is addressed below.

The Issue Surrounding the Creation of an Operative Report Does Not Support a Cognizable Claim

There is no recognized claim under Ohio law that creates a cause of action for the late creation of an operative report. More importantly, Petitioner twists the facts related to the operative report and ignores her own expert's testimony on this issue. The factual evidence and testimony related to this issue established that the resident was responsible for creating the operative report. Petitioner's own medical expert supported this policy and the reasoning behind it.

When the hospital discovered the oversight on the part of the resident to prepare the operative report, the hospital followed its procedures to make sure a report was prepared. The hospital first contacted the resident to request he prepare the report. When the resident refused to prepare the report the

hospital contacted Dr. Van Loveren as the attending. Pursuant to the policies, Dr. Van Loveren dictated the operative note when it became clear that the resident would not cooperate with either himself or the hospital.

Petitioner cites to the Ohio Supreme Court case of *Moskovitz v. Mt. Sinai Med. Center*, 69 Ohio St.3d 638 (Ohio 1994) for the proposition that Ohio recognizes a cause of action for alteration of medical records. While Petitioner is accurate in stating that Ohio law allows a claim for alteration of medical records, such law does not apply to this case. In *Moskovitz*, the plaintiff alleged a claim for medical malpractice and also sought punitive damages; the conduct supporting the claim for punitive damages was the deliberate alteration of medical records. There, the defendant-surgeon "whited-out" a typed entry in the medical record indicating that it was his decision to merely monitor a growth in the plaintiff's leg because he believed, at that time, the growth was benign. *Id.* at 643. A handwritten notation was inserted which provided that the plaintiff refused a recommended biopsy and follow up work. *Id.* Copies of the new record were distributed to different doctors and hospitals treating the plaintiff. Several months before she died of a malignant soft-tissue cancer that had originated from the growth in her leg, the plaintiff filed a complaint for discovery related to a potential medical malpractice claim. *Id.* at 640-41. The original medical record was eventually recreated during discovery, exposing the doctor's changes. In

reviewing whether punitive damages were appropriately rewarded in that case, the Ohio Supreme Court found that such an intentional alteration of documents was "indicative of actual malice," thereby rendering it necessary to submit the issue of punitive damages to the jury. *Id.* at 652. It further concluded that the doctor's "alteration of records exhibited a total disregard for the law and the rights of [the plaintiff] and her family," in that it was a blatant attempt by the doctor to exculpate himself for his medical negligence while placing the blame on the plaintiff. *Id.* Here there was no operative report ever created. Hence, there was no alteration or destruction of the medical record.

More importantly, Petitioner's own medical expert testified that the late preparation of the operative note had no causal relationship to any injury suffered by Petitioner. Petitioner's medical expert testified that the alleged failure to properly monitor the patient was unaffected and unrelated to the lack of an operative note. Specifically, Petitioner's medical expert was critical of the monitoring of the patient four days after surgery; in fact, following surgery all evidence suggested that the patient was recovering well and that there were no problems during the operation. Overall, Petitioner's expert acknowledged that it is acceptable to require the resident to prepare the operative note, that it is acceptable for a doctor to rely on the resident and the hospital to make sure an operative report is prepared or for the hospital to notify the doctor, and that regardless of the existence

of an operative report it did not result in any alleged injury.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the issues as raised by Petitioner in the Petition for Writ of Certiorari do not involve federal questions or matters of Constitutional law. The sole issues related to these Respondents involve matters of purely state law. Moreover, the courts below properly applied state law. As such, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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